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PALANISAMY PILLAI

v.

MUSA IBRAHIM & ANOR.

HIGH COURT MALAYA, KUALA LUMPUR

VOHRAH J

b

[CIVIL SUIT NO. 2002]

25 OCTOBER 1983

***TORT:** Negligence - Damages for personal injuries - Failure to provide safe system/place of work - Quantum of damages agreed upon - Whether the occupier or the owner liable - Apportionment of liability.*

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The second defendant owned a rubber processing factory at Kampong Sungei Serai in Ulu Langat, about 30 miles away from the nearest town Banting. As he had difficulty in recruiting workers for his factory, he entered into an agreement with the first defendant for the supply of workers to the factory. The plaintiff, one of 30 such workers, was employed to operate a milling machine belonging to the second defendant.

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On the day in question, the machine was defective in that the automatic system of the sweep-guard, close to the mouth of the machine was not working. In fact it has been out of order for two weeks. When the plaintiff had put in the second pile of scrap rubber, his left hand got caught by the milling units of the machine and as a result it was crushed.

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The plaintiff sued the defendants for negligence, in failing to provide a safe place of work and/or a safe system of work and/or alternatively by their breach, as employers, of the statutory duty imposed on them by the Factories and Machinery Act 1967.

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In the amended statement of claim, he proceeded against the defendants for negligence at common law and for breach of statutory duty in their capacities "as employers" and/or "as owners of the plant or appliances". He claimed damages for personal injuries and consequential loss suffered by him. The sum of RM72,300 as quantum of damages for both general and special, was agreed upon.

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It is not in dispute that there has been a breach of the Factories and Machinery (Fencing of Machinery and Safety) Regulations 1970. The only issue to be decided was, which of the two defendants is liable and if both, in what proportion. The second defendant contended that the statutory duty to ensure the safety of the machine was that of the occupier of the factory and not that of the owner of the machine.

Held:

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[1] The second defendant did use the machine in question as owner. As user and owner of the machine the second defendant had the responsibility to ensure that the regulations as to its safety and good repair were complied with and he was in breach of his statutory duty in allowing the machine to be used by the plaintiff.

[2] The first defendant was the employer of the plaintiff and was negligent in allowing the plaintiff to work on the defective machine.

[Liability against first defendant at 20%. Liability against second defendant at 80%.]

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Case referred to:

Kanagasabai Satkuru v. United Malayan Banking Corporation Bhd. [1981] 2 MLJ 23

Legislation referred to:

Factories and Machinery Act 1967, s. 3

Factories and Machinery (Fencing of Machinery and Safety) Regulations 1970, reg. 42(1)

For the plaintiff - K. Pasupathy; M/s. Murphy & Dunbar

For the 1st defendant - Hazzan Fauzi; M/s. Yusof, Idris, Hazzan & Fadzil

For the 2nd defendant - Gurbak Singh; M/s. Aziz & Mazlan

JUDGMENT

Vohrah J:

The plaintiff's claim is for damages for personal injuries and consequential loss suffered by him and occasioned allegedly by the negligence of the defendants as employers of the plaintiff in failing to provide a safe place of work and/or a safe system of work and/or alternatively by their breach as employers of the statutory duty imposed on them by the Factories and Machinery Act 1967.

At the very outset of the trial the Court was informed that the sum of RM72,300 was agreed upon as the quantum of damages, both general and special, and that the only issue to be decided was that of liability in respect of the defendants as no contributory negligence was being attributed to the plaintiff in any way. At the instance of Counsel for the second defendant and with the agreement of Counsel for both the plaintiff and the first defendant the issue formulated for the consideration of the Court was: Which of the two defendants *vis-a-vis* the plaintiff and on the pleadings is liable and, if both, in what proportion?

The facts of the case are as follows. The second defendant owned a rubber-processing factory at a place called Kampong Sungai Serai in Ulu Langat and the nearest town to it was Banting, 30 miles away, with the result that the second defendant had difficulty on its own recruiting workers for its factory. It therefore entered into an arrangement with the first defendant for the supply to the factory of workers to make up for its shortage and it paid him RM6 a day for each worker he supplied. Out of this amount the first defendant paid his worker RM5 and retained RM1 as his commission. The plaintiff was one of 30 such workers the first defendant supplied to the second defendant. On 27 November 1975 the plaintiff was operating a milling machine belonging to the second defendant. The machine was used to compress scrap rubber into rubber sheets. On the particular day the machine was defective in that the sweep-guard, which would normally have automatically slid laterally to close the mouth of the machine when it was switched on after being fed manually with scrap rubber, was not working and had in fact been out of order for the past two weeks. Consequently after the plaintiff had put in the second pile of scrap rubber his left hand got caught by the milling units of the machine and was crushed in the result.

Counsel for the second defendant rightly said (quoting Abdul Hamid F.J. in *Kanagasabai Satkuru v. United Malayan Banking Corporation Bhd.* [1981] 2 MLJ 23 at page 24) that "a Judge is bound to decide a case on the issues on the record" and that "where a plaintiff alleged a breach of duty arising from any given relationship, he had to specify with precision the relationship under which that duty arose." The plaintiff in his amended statement of claim is proceeding against the defendants for negligence at common law and for breach of statutory duty in their capacities "as employers" and/or "as owners of the plant or appliances".

- a* It is not in dispute that there has been a breach of the Factories and Machinery (Fencing of Machinery and Safety) Regulations, 1970 made under the Act but the question is: To whom should liability for the breach be attributed? It has been contended by Counsel for the second defendant that the statutory duty to ensure the safety of the machine was that of the occupier of the factory and not that of the owner of the machine unless the owner was using the machine in common with the occupier and this fact was specifically pleaded. The relevant legislation, reg. 42(1), reads:
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It shall be the duty of the occupier to comply with the provisions of these regulations and to ensure that they are observed provided that in the case of machinery used in common by the owner and the occupier these duties shall be the responsibility of both the owner and the occupier.

- c* Reg. 2 has provided for the same meanings to be assigned to the terms in the regulations as they appear in Part I of the Act and the word "occupier" has been defined in s. 3 of that part in relation to a factory as "a person who occupies or uses any premises as a factory" and "owner" as "the person for the time being receiving the rents or profits of the premises or machinery in connection with which the word is used, whether on his own account or as agent or trustee for any other person or who would so receive the same if the premises or machinery were leased." In my view it is clear on the evidence that the second defendant did use the machine in question as owner within the meaning of s. 3 because the scrap rubber was being milled into rubber sheets for its benefit and for the purpose for which (judicial notice can be taken) the second defendant was set up. I am of the opinion that the regulation envisages the existence of an actual functional or profit-making relationship between the machinery concerned and the person to whom responsibility for its safety and good repair is attached. I think it would be a case of placing too restricted and artificial an interpretation on reg. 42 if it is construed so as to require proof of common user by both the owner as such and the occupier as such. I do not accept that because there were two lines of work, one for the processing of scrap rubber manned wholly by workers supplied by the first defendant and the other for the processing of latex manned normally by workers recruited wholly by the second defendant, that one must conclude that there were two separate work forces under two distinct employers or that there were two distinct premises especially bearing in mind the plaintiff's evidence that the first defendant would instruct the workers he recruited to work on the latex line when it was short of the normal workers and the un rebutted evidence of the first defendant that he was engaged by the second defendant to provide labour for both lines. As such the first defendant cannot be considered as the occupier per se of the factory or any part thereof. The second defendant as owner and user of the machine in question had the responsibility to ensure that the regulations as to its safety and good repair were complied with.
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On the pleadings and on the evidence adduced I therefore find that the first defendant was the employer of the plaintiff and was negligent in allowing him to work on the defective machine. On the same basis and in the light of my interpretation of reg. 42, I also find that the second defendant as owner of the machine was in breach of his statutory duty in allowing the machine to be used by the plaintiff. Counsel for the plaintiff has correctly pointed out the unequal positions of the two defendants in this case. The first defendant did report the defect in the machine to the second defendant's foreman when he discovered it two weeks before the accident and the plaintiff himself also reported the defect to the second defendant's

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mechanic but nothing seemed to have been done apart from measurements having been taken of the sweep-guard frame. I think the second defendant had the primary duty to see that the machine was safe for use. In the circumstances in entering judgment for the plaintiff in the agreed sum of RM72,300 I would apportion liability against the first defendant at 20% and against the second defendant at 80%. The plaintiff shall be entitled to his costs.

Also found at [1984] 1 CLJ 34

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